

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 14 OF 2020

(Originating from Civil Case No.3 of 2019 of Hai District Court)

DAVIS AMINIEL MMARI..... APPELLANT

VERSUS

HERIETH GODFREY NG'UNDA RESPONDENT

JUDGMENT

17/11/2021 & 23/12/2021

SIMFUKWE, J.

The appellant Davis Mmari has been aggrieved by the decision of the District Court of Hai in Civil Case No. 3/2019 (trial court) delivered on 20/11/2020. In the said decision, the trial court dismissed the suit instituted by the appellant who was the Plaintiff before the trial court suing the respondent herein claiming damages at a tune of Tsh. 125,000,000/ for defamation.

The facts giving rise to the dispute between the parties and consequently this appeal is to the effects that, the appellant filed a suit claiming for the damages of Tsh 125,000,000/- alleging that the respondent gave birth and registered the plaintiff as the biological father of her child. Besides that, the respondent kept telling people and claiming that the appellant is



the biological father of the child. Believing that the act of registering and saying that he is a biological father is defamatory, humiliated, and caused pain, agony and embarrassment. Hence, reduced him to public odium and ridicule and made reasonable members of society shun him and reduced his marriage value. The appellant unsuccessfully instituted the above-mentioned case before the trial court claiming for the following reliefs;

- a. Damages amounting to Tsh 125,000,000/=*
- b. A permanent injunction restraining the Defendant and all those who claim under her and the world at large from uttering and or promoting the false allegations of the plaintiff being biological father of the defendants' baby boy.*
- c. Costs and interest.*
- d. Any other relief that this Honorable court may deem just and fair.*

Aggrieved by the trial court's decision, the appellant filed his appeal in this court under the following grounds:

- 1. That the learned magistrate erred in finding that there is no defamation within the meaning.*
- 2. That the learned trial magistrate erred in not ordering the respondent to pay costs.*
- 3. That the learned magistrate erred in not heading her judgement.*

This appeal was ordered to be argued by way of written submissions since the respondent was unrepresented. The appellant enjoyed the services of Advocate John Shirima.

The Appellant's advocate in his written submissions opted to argue ground one and two jointly. However, he dropped the 3rd ground on the reasons that it cannot prejudice the rights of parties.



In support of the 1st and 2nd grounds of appeal, the learned advocate submitted to the effect that it is on record that the appellant was taken to Bomang'ombe Police station after the defendant had complained about child maintenance. Despite denying having a child with her, he was kept in the police lockup for two days. His relatives donated the Money Tsh 540,000/= as maintenance of the said child after being denied police bail. He was also forced to pay maintenance of Tsh 180,000/- per month from December 2014 till April 2015.

It was further argued that the appellant decided to request for DNA test and the respondent was informed but she failed to appear on the date scheduled for DNA test. The respondent kept going around the village claiming that the appellant is a biological father of her child. The learned advocate was of the view that the false publicizing was defamatory to appellant's reputation as it reduced the appellant's marriage value, causing embarrassment and all members of society avoiding him as responsible (sic) man desertion character. This prompted the appellant to seek advice from his lawyer hence Civil Case No. 3/2019 was instituted.

Mr. Shirima argued further that, it is trite law in civil cases that the standard of proof is on balance of probability. That is the party who furnishes heavier evidence than the other must be declared the winner. He proceeded to substantiate the above contention by defining the word defamation according to www.law.cornell.edu/wex/defamation to mean a statement that injures a third party's reputation. The tort of defamation includes both libel (written statements) and slander (spoken statements).

According to Mr. Shirima, to prove prima facie defamation a plaintiff must show four things:



1. A false statement purporting to be a fact
2. Publication or communication of that statement to a third person and
3. Fault amounting to at least negligence and
4. Damages or some harm caused to the person or entity who is the subject of the statement.

In respect of these elements, it was submitted that the appellant managed to prove that he is not a biological father of the alleged child as the fact that at first instance the respondent neglected to attend DNA test which was proposed to be conducted at KCMC. This revealed that she made a false statement which later was discovered that the appellant was not a biological father of the said child. It was opined that the respondent communication of that statement to a third person thus, police led to arresting the appellant and such statement was made with bad intention and the appellant suffered both mentally and physically. Also, the appellant suffered economic loss since he paid for maintenance on false allegations.

Mr. Shirima was of the view that the said statement which was published by the respondent is purely defamatory on the ground that it was published without lawful justification. This argument was supported by the case of **SIM vs STRECH [1936] 2 All ER 1237; 52 TLR 669,671** in which Lord Atkin stated:

"A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, which tends, that is to say, to lower him in the estimation of right-thinking members of society generally and in particular to



cause him to be disregarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem."

On the strength of his submissions, the learned counsel for the appellant prayed this court to allow the appeal with costs and quash the decision of the trial court and enter judgment in favour of appellant as per the reliefs stated in the plaint.

In reply, the respondent disputed the first ground of appeal that there is no defamation within the meaning by referring to the case of **Meneja Mkuu Zanzi Resort Hotel vs Said Paramana, Civil Appeal No. 296 of 2019** which provides three ingredients of defamation, which are: First, the statement complained of must be defamatory and made by a person alleged to have made defamation, second, the alleged defamatory statement must refer to the claimant and third the statement complained about must be proved to have been published.

Submitting for the first ingredient that the statement must be defamatory and made by person alleged to have made defamation, it was submitted that the statement must make an ordinary/ reasonable person hearing it to think less of person who has been referred to in the said statement or injure the reputation of a person in the society. In respect of this argument, the respondent opined that in this case the words that the appellant impregnated her does not amount to defamatory words considering that they had love affairs for four years. She was of the view that those words were spoken in a good faith and without malice and so she had a qualified privilege basing on the relationship they had. In addition to that, it was submitted that the statement was made in



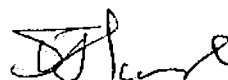
pursuant of legal, moral or social duty and the party making the statement had an interest in the said communication.

The respondent argued further that, she had an interest on the statement which she made because she sought the appellant was the biological father of her child due to the relationship they had. It was further contended that malice does not exist where the defendant honestly and reasonably believes in the truth of the communication. She cited the case of **Athuman Khaifan vs P.M Jonathan [1980] TLR 6**. She concluded the first limb of her argument by stating that the fact that the first ingredient that the statement must be defamatory does not stand then, the other remaining ingredients falls with it, the appellant has failed to prove how much he was injured.

It was further submitted by respondent that the statement made by respondent did not injure the reputation of the appellant. She was of the firm view that, the law of defamation is not about protecting pride, but it is there to protect reputation and offering restitution to those whose reputations have been wrongly damaged. In line with this argument, the respondent condemned the appellant's advocate for misleading the Court that the respondent had injured the reputation of the appellant while it is clear that what the appellant is claiming is his pride.

However, the respondent disputed the argument that the appellant was kept in the lockup for two days and that he was denied police bail till his relative paid Tsh. 540,000 as maintenance costs of the child.

Responding to the second ground of appeal that the trial magistrate erred in not ordering the respondent to pay costs, the respondent was of the view that the appellant had served demand letter to the respondent



before he commenced the suit. She argued that the law is very clear under **Rule 68 of Advocate Renumeration and Taxation Rules** that:

"If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed of found due at, or before the first hearing, no advocate's cost will be allowed except on the special order of the Judge."

Basing on this provision, the respondent stated that it is trite law which is undisputed that the losing party should bear the costs of a matter to compensate the successful party for expenses incurred for having to vindicate the right. However, this right is not automatic. For the successful party to be compensated, he must have issued the demand notice to the defendant as it was stated in the case of **Abdul Aziz Velj Ratansi vs Shari Sign (1968) HCD 453** that *in absence of a demand notice, a plaintiff will not be entitled to advocate's costs and general Costs.*

She argued that in this case, the appellant did not serve the demand notice to her, so he is not entitled to costs since he waived his right to costs in the case, if he won the case. That, in Civil Case No. 3 of 2019, he failed to establish his case of defamation.

In the end, the respondent prayed the court to dismiss the appeal with costs and uphold the decision of Hai District Court which is to the effect that there is no defamation.

In his rejoinder, the appellant's counsel contended that the respondent has totally failed to grasp the gist of the appeal. He opted to reiterate what he had submitted in submission in chief.



Mr. Shirima further refuted the allegation that the two had love affairs. He argued that it is a cardinal principle that who alleged must prove and so the respondent claims were untrue, and it was published without lawful justification which lowered the plaintiff's reputation in the estimation of right-thinking members of the society.

The learned advocate maintained that through the trial court proceedings, the appellant managed to prove his case on the standard required in civil litigation.


In addition, Mr. Shirima submitted to the effect that the cause of action means all facts which the plaintiff would have to prove to succeed as it was stated in the case of **Auto Garage and Others vs Motokon No.3 of [1971] EA 514** that:

"A plaint may disclose a cause of action without containing all the facts constituting the cause of action provided that the violation- by the defendants of a right is shown"

It was argued that similar holding was stated in the case of **Lake Motors Ltd vs Overseas Motor Transport (T) Ltd (1959) EA 603**.

Mr. Shirima reiterated his prayer that the court should allow the appeal and quash the decision of the trial court and enter judgment in favour of the appellant as per reliefs stated in the plaint.

Having gone through both parties' submissions and trial court's record, the only issue is ***whether the tort of defamation was proved before the trial court.***



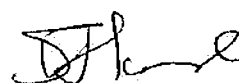
The **Black's Law Dictionary, 8th Edition**, at page 448 has defined defamation to mean, *the act of harming the reputation of another by making a false statement to a third person.*

Also, the **Oxford Dictionary of Law, 5th Edition** at page 140, defamation has been defined to mean *the publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him.*"

The trial magistrate at page 5 to 7 of the judgment was of the view that though the statements made were untrue, the same were not defamatory. To be more precise, I wish to quote page 7 of the judgment for ease reference:

"The statement is not defamatory. The plaintiff grounding his complaint from the reason that the statement reduced his marriage value. It is plainly from the record that the plaintiff is unmarried man. There is no evidence that he has a fiancée or is in preparation of getting married. Apart from that the society we are living in, it is a shame and embarrassment for a lady or woman to have a child while not married. The situation is different to a man. In the circumstance there was no proof of defamation with regards to injuring (sic) the reputation of the plaintiff."

From the meaning of defamation in the quoted dictionaries, the plaintiff was required to prove among other things that the words were defamatory to the extent of lowering his reputation in the society. Also, he was supposed to prove how those words injured him. I have keenly passed through the trial court's records, it is on record that, the appellant



marital status was unmarried, a degree holder and businessman. There is no evidence if at all he was planning to marry or had a fiancée. As rightly decided by the trial magistrate, it is not shameful for a man to have a child taking into consideration that the appellant was a bachelor. In other words, the appellant did not prove how such statement lowered his reputation or how the same injured him socially and economically. In the case of **Meneja Mkuu Zanzi Resort Hotel** (supra), the Court of Appeal at page 16 of its judgment when conceptualizing what amounts to defamation it referred to **Halsbury's Laws of England, Vol 28, 4th Edition** which defined defamatory statement to mean:

*"a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to hatred, contempt or ridicule or to convey an imputation on him disparaging or **injurious to him in his office, profession, calling, trade or business.**"*[Emphasis added]

I subscribe fully to the above thinking. I am of considered view that since the appellant herein failed to prove how he was injured by such statement, then the trial magistrate was correct in its findings that there was no proof of defamation in respect of the appellant.

Before I pen off, the appellant's counsel had brought to the attention of the court that the respondent had failed to prove the allegation that the two had love affairs. With due respect, this is not a position because, the burden of proof never shifts to the respondent until the plaintiff discharges the same. The Court of Appeal when it was dealing with the issue of defamation in the case of **Jasson Samson Rweikiza vs**



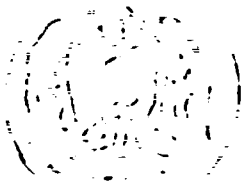
Novatus Rwechungura Nkwama, Civil Appeal No.305 of 2020 at page 14 stated that:

"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

In the circumstances, I find no justification for disturbing the findings of the trial court. Consequently, I find the appeal has no merit and it is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 23rd day of December 2021.



A handwritten signature in black ink, appearing to read 'S. H. Simfukwe'.

S. H. SIMFUKWE

JUDGE

23/12/2021